

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

STATE OF MAINE, <i>et al.</i> ,)	
)	
Plaintiffs,)	
v.)	Civil Action No. 1:14-cv-264-JDL
)	
ANDREW WHEELER, Acting Administrator,)	
United States Environmental)	
Protection Agency, <i>et al.</i> ,)	
)	
Defendants,)	
and)	
)	
HOULTON BAND OF MALISEET)	
INDIANS, and PENOBSCOT NATION,)	
)	
Intervenors-Defendants.)	

**MAINE’S OPPOSITION TO THE PENOBSCOT NATION’S
MOTION TO FILE COUNTERCLAIM**

Plaintiffs (Maine) submit this opposition to the motion of the Penobscot Nation (PN) to file a counterclaim. ECF 141. PN’s motion seeks to add a counterclaim against Maine for declaratory relief establishing that Maine has a duty “to recognize and protect” the sustenance fishing rights of PN members in setting state water quality standards. *Id.* at 1. PN filed its motion two days after EPA filed its motion seeking a voluntary remand for the purpose of reconsidering and modifying the decisions under review in this matter. ECF 139. As set forth in more detail in Maine’s Limited Opposition to EPA’s Motion for Voluntary Remand, ECF 151 (Limited Opposition to Remand), Maine takes the position that remand is appropriate here, but with vacatur, or in the alternative, if the Court retains jurisdiction, holds this case in abeyance, and establishes a reasonable timeframe (120 days) for EPA to reconsider its position and take new action on remand.

The Court's ruling on EPA's remand request will necessarily dictate its ruling on PN's motion. As PN notes in its motion, ECF 141 at 1, its proposed counterclaim is the "mirror image" of Count II of Maine's Second Amended Complaint. As such, the Court could grant PN's motion – and Maine would have no objection to its doing so – as long as Maine's Complaint and its challenge to EPA's 2015 decisions remain before the Court for adjudication. In that scenario, Maine's Complaint would continue to provide the Court with jurisdiction through its timely APA claims and its allegations of a live controversy over specific water quality standards. PN's proposed counterclaim could likewise be adjudicated within that context. If, however, the Court grants EPA's motion for remand with vacatur, as it should, PN's motion must be denied, because remanding the claims raised in Maine's Complaint would leave the Court with no jurisdictional basis over the proposed counterclaim. As is explained below, a remand would render PN's counterclaim non-justiciable at least until EPA acts on the remand and there is again a live controversy before the Court regarding a final EPA action or the legal sufficiency of a specific water quality standard.

MEMORANDUM OF LAW

I. The Court would lack jurisdiction to adjudicate PN's proposed counterclaim for declaratory relief in the absence of justiciable APA claims.

Maine originally filed this case in 2014 to force EPA to adhere to its mandatory duty under the Clean Water Act (CWA) to act on Maine's outstanding water quality standards for tribal waters that had been pending before EPA since as far back as 2004. ECF 1, 7. In February 2015, while this action was pending, EPA issued the challenged decisions at issue here. ECF 22.¹ Maine then filed its Second Amended Complaint to challenge the various EPA decisions

¹ On February 5, 2015, EPA filed a notice of its decisions, ECF 22, along with a letter to the Commissioner of Maine's Department of Environmental Protection dated February 2, 2015, outlining EPA's decisions, ECF 22-1; a lengthy supporting analysis, ECF 22-2; an EPA response to comments

(both approvals and disapprovals) supporting EPA's ultimate disapproval of certain Maine water quality standards (Maine's water quality criteria) for an unspecified set of tribal waters. ECF 30. Maine's Complaint included claims under the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365,² and the Administrative Procedures Act, 5 U.S.C. §§ 703 *et seq.* (APA), which currently provides the ongoing basis for the Court's jurisdiction over this matter by virtue of Maine's challenge to EPA's February 2015 decisions. 5 U.S.C. §§ 704, 706.

As explained in Maine's Limited Opposition to Remand, ECF 151, EPA's remand request should be granted with vacatur, which will allow the agency the opportunity to address and resolve issues that Maine's Complaint presented to the Court for adjudication, while eliminating the disruptive consequences and harm to Maine that would result if the challenged decisions are allowed to stand while EPA acts to materially change them. If a remand with vacatur is granted, PN's motion to file a counterclaim must be denied because the Court would lack jurisdiction to adjudicate a request for declaratory relief as a stand-alone cause of action. *See Akins v. Penobscot Nation*, 130 F.3d 482, 490 n.9 (1st Cir. 1997) (*citing Colonial Penn. Group, Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 232 (1st Cir. 1987)) (explaining that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, generally does not itself create an independent, substantive cause of action).³

document dated January 30, 2015, ECF 22-3; and a supporting opinion letter from the Solicitor of the Department of the Interior dated January 30, 2015, ECF 22-4, which EPA relied on in part in its challenged decisions, ECF 22.

² Maine's CWA mandatory duty claims (Count III) were dismissed on November 18, 2016. ECF 55.

³ Should the Court order remand without vacatur, a question would also remain as to the justiciability of Maine's pending APA claims, which may well be rendered moot by EPA's decision not to defend the challenged decisions and to materially change them on remand. Any EPA action on remand could not create a live controversy or become ripe for challenge under the APA until issuance by EPA. As argued in Maine's Limited Opposition to Remand, if the Court orders remand without vacatur here, it should also retain jurisdiction, hold this case in abeyance, and establish a reasonable deadline (120 days) for EPA to undertake its action on remand to minimize prejudice to Maine and to ensure a timely remand process.

PN's motion, filed years after this case was initiated and two days after EPA's remand request, appears to be an attempt to frustrate the remand and prevent the agency from revisiting the challenged decisions. But the proposed counterclaim merely asks the Court to issue the inverse declaration from that sought by Maine; it does not expand or alter the issues already before the Court, and therefore should not change the Court's analysis regarding remand. If remand were appropriate before PN filed its motion, as Maine contends, it is no less appropriate now. PN's motion should be denied without prejudice to its ability to reassert its sustenance fishing argument in any future litigation over state or federal decisions regarding specific water quality standards, including any duly-filed challenge to EPA's action on remand.

Dated: September 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2018, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification and a copy of such filing(s) to all counsel of record who have consented to electronic service. To my knowledge, there are no other non-registered parties or attorneys participating in this case.

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